No. 95-173

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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60 pp

QUESTION PRESENTED

Whether the district court properly invoked the fugitive disentitlement doctrine to bar petitioner from contesting a civil forfeiture action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 47 F.3d 1511. The opinion of the district court (Pet. App. 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995. Pet. App. 38a-39a. The petition for a writ of certiorari was filed on July 28, 1995, and was granted by the Court on January 12, 1996 (J.A. 183). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

STATEMENT

In October 1989, the United States District Court for the District of Nevada unsealed an indictment charging petitioner with the leadership, over many years, of a major marijuana trafficking operation. On the same day, that court unsealed a complaint filed by the government in a civil forfeiture action against various properties allegedly used to facilitate, or traceable to the proceeds of, the drug offenses charged in the criminal indictment. Petitioner and his wife answered the civil complaint and claimed a substantial amount of the property. Petitioner failed, however, to appear to answer the criminal charges against him. Because petitioner was a fugitive from criminal justice, the district court dismissed his claims in the forfeiture action. The court later granted summary judgment against petitioner's wife, and entered an order of forfeiture. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner was born in California in 1947, and he lived there and in Nevada and Hawaii until sometime in 1988. See, *e.g.*, J.A. 115, 160-161; Pet. C.A. App. 297. On October 25, 1989, the United States District Court for the District of Nevada unsealed an indictment charging that petitioner had been one of the leaders of a major marijuana trafficking organization founded when petitioner was in college and that operated for more than 20 years until approximately 1986. On the same day, that court unsealed the government's complaint in this *in rem* action, which sought forfeiture under 21 U.S.C. 881(a)(6) and (7) of real and personal property in Nevada, California, and Hawaii.

The complaint was supported by the affidavit of Dennis A. Cameron, a Special Agent with the Drug Enforcement Administration, who attested that the property had been used to facilitate, or was traceable to the proceeds of, the drug offenses charged in the indictment. J.A. 10-28. Cameron's affidavit recounted that petitioner and his co-

conspirators had smuggled tens of thousands of pounds of marijuana from Mexico and Thailand and distributed it in Northern California and Nevada between 1969 and 1986. See, *e.g.*, J.A. 12-17, 23-24. Cameron's affidavit also noted that an informant had seen petitioner meet with Jurgen Karl Peter Ahrens, a marijuana smuggler, at petitioner's Lake Tahoe home, and had seen Ahrens take delivery of a suitcase full of U.S. currency that had been stored in the wine cellar there. J.A. 17. The affidavit further stated that petitioner had bought real estate in Hawaii in the name of K.E.S., a Cayman Islands corporation he owned, and had sold property to a Cayman Islands corporation owned by another drug smuggler, Marcus Zybach, in a transaction brokered by the sister of a third smuggler (and petitioner's business partner), Ciro Mancuso. J.A. 18. Cameron's affidavit alleged that, although petitioner's accounting records indicated a net worth of more than $2.1 million, petitioner's total adjusted gross income for the period 1979 to 1986 was less than $250,000. J.A. 20-21, 23.[1]

Petitioner's father was born in Switzerland (Pet. C.A. App. 401), and petitioner is therefore recognized as a Swiss citizen as well as a citizen of the United States. See Pet. App. 2a; J.A. 54-55, 59. After authorities had arrested one of petitioner's co-conspirators and started investigating petitioner's own activities (see J.A. 160), but before the grand jury returned its indictment, peti-

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[1] The original forfeiture complaint was filed under seal on July 13, 1989, the same day the original indictment was returned (under seal). An amended complaint was filed on October 24, 1989 (J.A. 1), the same day the grand jury returned the superseding indictment against petitioner. J.A. 54. The complaints sought forfeiture of a wide array of property associated with, or derived from, the activities of the criminal enterprise, not all of which was claimed by petitioner and his wife. The properties claimed by petitioner and his wife were severed and made the subject of the present separate proceeding. Pet. App. 2a; J.A. 45.

tioner left the United States and settled in Switzerland. Pet. App. 2a; J.A. 161. The extradition treaty between Switzerland and the United States does not require either party to surrender its own nationals. In the five years since his indictment, petitioner has neither returned voluntarily to this country to face the criminal charges against him, nor made any good-faith effort to submit to the criminal jurisdiction of the district court. Pet. App. 2a-3a.

In April 1990, however, counsel representing petitioner and his wife did file answers and claims on their behalf in the civil forfeiture action. Pet. App. 27a; J.A. 29-34. The government moved to strike their claims and for summary judgment, arguing that petitioner should not be heard in the civil forfeiture action while he remained a fugitive from the related criminal case, and that his wife's claims were entirely derivative of his own. Pet. App. 3a, 27a; J.A. 42-52. Petitioner filed a response (J.A. 57-87), in which his attorneys described some of petitioner's real estate transactions over the years (J.A. 65-76), and argued that petitioner was not a fugitive because he had not "left the country because of knowledge of a *pending* prosecution" (J.A. 61 (emphasis added)). After hearing argument (Pet. C.A. App. 262), on December 31, 1990, the court granted the government's motion with respect to petitioner (but not with respect to his wife). Pet. App. 17a-26a.[2]

In granting the motion, the court noted that "an intent to avoid prosecution (conferring the 'fugitive' status) could be inferred" from a person's failure to submit to arrest when he knows he is wanted by police. Pet. App. 18a (citing *United States* v. *Gonsalves*, 675 F.2d 1050, 1052 (9th Cir.), cert. denied, 459 U.S. 837 (1982); *United States* v. *Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978); *United States* v. *Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976)). The court accordingly determined that petitioner's refusal to return to face known charges against him was sufficient to render him a fugitive. Pet. App. 18a.

[2] In denying the government's motion as to petitioner's wife, the court noted that at least two parcels of real estate at issue were community property, and it identified factual issues concerning the community status of the other property sought by the government and the source and nature of the funds used to acquire it. Pet. App. 28a.

The court noted that in *United States* v. *$129,374*, 769 F.2d 583 (9th Cir. 1985), cert. denied, 474 U.S. 1086 (1986), the Ninth Circuit had applied the fugitive disentitlement doctrine in a civil forfeiture case, but had reserved the question whether that doctrine should be applied to a fugitive claimant who had not yet been convicted in the related criminal case. Pet. App. 19a. After considering the policies and precedents supporting the disentitlement doctrine, *id.* at 20a-26a, the district court answered that question in the affirmative. The court observed that petitioner "want[ed] th[e] court to listen to his claims in the forfeiture proceeding without subjecting himself to th[e] court's jurisdiction in the criminal matter," and was therefore attempting to "flout[] th[e] court's power to prosecute him" (*id.* at 21a); that the criminal and civil proceedings in this case were closely related (*id.* at 22a-23a); and that petitioner was "responsible for his own plight," because he could avoid disentitlement at any time by returning and "submit[ting] * * * to the jurisdiction of th[e] court" (*id.* at 23a; see also *id.* at 24a, 26a). Accordingly, the court concluded that, "in this case, the disentitlement doctrine bar[red] [petitioner] from defending the civil forfeiture action *in absentia*." *Id.* at 25a-26a.

2. The district court, after ordering petitioner's claim stricken, retained jurisdiction pending resolution of the claim filed by petitioner's wife. The government noticed a deposition in Nevada of Karyn Degen, but she successfully moved for a protective order, which required that she be deposed in Switzerland. See Pet. C.A. App. 540. On April 30, 1991, petitioner and his wife noticed their own depositions in Geneva, Switzerland, for May 22 and

23, 1991. *Id.* at 207-210. In a proposed stipulation that was rejected by the government, petitioner and his wife sought to "limit[] [the] scope" (*id.* at 200) of the Swiss depositions to certain subjects of their choosing, to preclude inquiry into petitioner's income before his marriage, and to limit questioning to legitimate sources of income.[3] See *id.* at 200-201. The government immediately moved for a protective order to vacate that notice of deposition, noting that permission from Swiss authorities to take the depositions—necessary to avoid criminal liability under Swiss law—could not be obtained on such short notice. *Id.* at 185-190. See generally Code pénale suisse art. 271. The government's motion was granted. Pet. C.A. App. 541. The depositions were cancelled and not rescheduled. See *ibid.*

In December 1992, after more than two years of pretrial proceedings (see Pet. App. 2a), the government again moved for summary judgment against Karyn Degen. *Id.* at 3a. The motion was supported by affidavits of three of petitioner's former associates, including two major participants in his marijuana smuggling operations. *Ibid.*; J.A. 135-161. Those affidavits detailed petitioner's involvement in the smuggling and distribution of considerable quantities of marijuana since 1969, revealed the substantial amounts of money that petitioner had derived from those activities over the years, and noted that petitioner had had no significant income from legitimate sources during the long period covered by the criminal indictment. Pet. App. 3a; J.A. 135-161. Karyn Degen obtained numerous extensions of time to respond to the

[3] The topics enumerated by the proposed stipulation included only the acts and intent of the parties relevant to the transmutation of petitioner's separate property into community property; the separate property funds of Karyn Degen used to purchase or improve property; income during their marriage from petitioner's construction business; rental properties and the sale of properties; and loans and gifts from third parties used to purchase or improve property. Pet. C.A. App. 200-201.

government's new motion for summary judgment, and in February 1993 she obtained an order from the district court reopening discovery for an additional 60 days. Pet. App. 3a; Pet. C.A. App. 40-41, 543-544. The district court *sua sponte* granted two additional extensions of time, which were accompanied by warnings that failure to respond would result in the entry of a default judgment. Pet. C.A. App. 17-18, 39; Gov't C.A. Br. 6-7. Karyn Degen never filed a response. Accordingly, on June 23, 1993, the court granted the government's motion for summary judgment. Pet. App. 30a.

On August 17, 1993, the court entered a final order of forfeiture vesting in the United States title to the properties claimed by petitioner and his wife. Pet. App. 32a-37a.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first noted that it and other courts have applied the disentitlement doctrine in civil cases, including forfeiture proceedings, that are related to the criminal case from which the disentitled party is a fugitive. *Id.* at 4a. The court concluded that, as had been true in *$129,374, supra*, the criminal and civil proceedings against petitioner and his property related "directly" to "the same unlawful drug dealing scheme," Pet. App. 4a, and would therefore "satisfy any relatedness test," *id.* at 5a. The court observed that it had not previously applied the fugitive disentitlement doctrine in a case in which the disentitled party had not yet been convicted of a crime. The court held that distinction immaterial, however, finding that the district court had "correctly concluded * * * in December 1990" that petitioner's choice not to return to face the charges against him, "presumably to avoid arrest on the criminal charges," had rendered him a fugitive and demonstrated the sort of disrespect for that court's criminal jurisdiction that the disentitlement doctrine is intended to address. *Ibid.*

The court rejected (Pet. App. 6a-7a) petitioner's argument that the disentitlement doctrine should not apply

because in November 1992, nearly two years after the district court ordered his claim struck, he was arrested by Swiss authorities, "at the behest of the United States government, which wished to 'transfer' its prosecution to Switzerland because extradition was impossible." *Id.* at 6a. The court observed that the only evidence of such an arrest contained in the record was an affidavit of counsel for petitioner and his wife, which contained "virtually no factual statements based on personal knowledge." *Ibid.* The court also noted that petitioner had moved to supplement the record on appeal with two letters that, he represented, had been sent to Swiss authorities by the Department of Justice's Office of International Affairs, and that were attached to petitioner's reply brief. The court rejected the motion to supplement the appellate record, explaining that the letters "were never submitted to the district court," and were "unauthenticated and, so far as [the court could] discern, * * * hearsay not subject to any exception." *Id.* at 6a & n.1; see also *id.* at 7a (noting absence of "credible evidence properly in the record * * * to support [petitioner's] allegations of government involvement in his arrest and prosecution in Switzerland"). The court also noted that, "[e]ven putting th[o]se problems aside," petitioner "ha[d] never proffered any supporting evidence or argument explaining the import of the letters." *Id.* at 6a.[4]

[4] The court of appeals found one error in the district court's opinion disposing of petitioner's claim (Pet. App. 7a-8a): that court had erred in holding (*id.* at 26a) that it had no discretion about whether to disentitle a claimant in a particular case. Rather, the court noted, "the doctrine is discretionary, not mandatory." *Id.* at 8a. Because petitioner did not argue that issue on appeal, however, the court found that any claim based on that error was waived. *Ibid.* The court also rejected as "utterly without merit" a motion, filed by petitioner and his wife shortly before oral argument, that claimed that the civil forfeiture constituted a second punishment purportedly barred by the Double Jeopardy Clause. The court noted that because neither petitioner nor his wife had been subject to criminal prosecution, the forfeiture action did not implicate double jeopardy issues. *Id.* at 15a-16a.

The court also affirmed the entry of summary judgment against Karyn Degen. Pet. App. 8a-16a. After reviewing the procedural history and the record in detail (*id.* at 9a-10a, 12a), the court held (*id.* at 10a-12a) that the district court's entry of a default judgment was a proper application of a facially valid local rule. The court concluded that the affidavits submitted with the government's second summary judgment motion, if believed, established that petitioner "earned enormous amounts of money from illegal narcotics trafficking and had virtually no legitimate income," and that that showing was sufficient to establish probable cause for the forfeiture. *Id.* at 12a. Because "the government's papers were sufficient and on their face revealed no factual issue" (*id.* at 13a), and because Karyn Degen, despite fully adequate opportunities to develop and present opposing evidence, had failed to respond, the district court did not abuse its discretion in granting summary judgment against her. *Id.* at 13a-14a. Petitioner's wife did not seek further review in this Court, and the judgment accordingly became final as to her claims.

SUMMARY OF ARGUMENT

The federal courts possess inherent authority to regulate their dockets through the enforcement of reasonable rules. A core element of that authority is the power to impose sanctions designed to remedy litigation abuses and to ensure compliance with the orderly process of litigation. A settled expression of that inherent authority is the power of the court to apply the fugitive disentitlement doctrine. That doctrine originated in the practice of an appellate court to dismiss the appeal of a criminal defendant who became a fugitive during the pendency of the appeal. The purposes and logic of that doctrine also justify the remedy imposed here: the disentitlement of

petitioner, a fugitive from criminal justice, from presenting claims in a related civil forfeiture action pending before the same district court.

A fugitive's absence threatens the orderly and fair litigation of the forfeiture action, and it represents an ongoing affront to the dignity of the court. A fugitive who remains outside the reach of the court's processes cannot reliably be made to respond to the court's supervision of discovery or other steps in the litigation; rather, the fugitive asserts the authority to dictate to the court the terms on which he will participate in the action. Indeed, petitioner's refusal to stand trial on the criminal charges pending against him unmistakably conveys his intention to use his foreign residence as a shield against the authority of the district court, and to comply with the court's process only insofar as it benefits him. "[N]o court is bound to submit" to such "contempt of its authority" (*Allen* v. *Georgia*, 166 U.S. 138, 141 (1897)). It is particularly unseemly for petitioner, a citizen of the United States (as well as Switzerland), to insist on eluding the grasp of the criminal justice system, while demanding the right to call upon the court's resources in a closely related civil case.

That petitioner has not yet been tried and convicted on the related criminal charges strengthens the court's interest in applying the disentitlement doctrine. Pretrial fugitivity imposes significant burdens on the administration of justice; it impedes speedy trials and wastes judicial resources by preventing the joint trial of co-defendants. Pretrial fugitivity also threatens the integrity of the criminal justice system if a claimant is allowed to participate in a related civil case; it would permit the claimant to use broad civil discovery rules to circumvent established restrictions on criminal discovery, and thereby to probe the extent to which the government's case may be vulnerable to contrived or perjured testimony or a tailored defense. No court need countenance the risk that a fugitive,

in the guise of defending the civil action, may strive to defeat his criminal prosecution.

The Due Process Clause does not bar disentitlement in this setting. Petitioner has had what that Clause guarantees him: a reasonable opportunity for a hearing. It is well established that courts may impose reasonable procedural restrictions on the availability of a hearing and may, without violating due process, dismiss a case or enter default judgment for noncompliance with those rules. Requiring that a litigant submit to the court's criminal jurisdiction before he may have a hearing on the merits of a related civil case is a straightforward application of that principle, and rationally advances the court's interest in orderly procedure by imposing a requirement with which a litigant can readily comply. Indeed, if a criminal defendant may forfeit his right to protect his interest in liberty by assuming fugitive status, he surely may forfeit the lesser interest in defending his property rights.

Petitioner advances three alternative arguments for avoiding disentitlement, none of which has merit. First, he argues that as a matter of common parlance and legal usage his refusal to come to this country to meet the criminal charges does not qualify him as a fugitive. That claim is incorrect not only on its own terms, but also as a guide for applying the disentitlement doctrine. A person who purposefully remains outside the reach of this country's legal system to avoid a trial on criminal charges is a fugitive in every sense that is relevant to the disentitlement doctrine.

Second, petitioner argues that he ceased to be a fugitive when he was arrested by Swiss authorities, in Switzerland, at the urging of the United States and based on the charges that underlie the federal criminal indictment. The short answer to that contention is that petitioner never presented any support for it in the district court. The court of appeals properly found it waived. And in any event petitioner has never even claimed that he would

have returned to this country but for the actions of the Swiss government, or that he has made a good-faith attempt to do so.

Finally, petitioner argues that our litigation of the Swiss prosecution issue in the lower courts was misleading and left the government with unclean hands that disqualify it from invoking the equitable doctrine of disentitlement. Our misstatements below, however, did not produce the holding of the court of appeals that petitioner waived his claim that the Swiss prosecution ended his fugitive status; that default is solely attributable to petitioner. In any event, the unclean hands doctrine should not be applied so as to defeat the public interests promoted by disentitlement. Those interests are compelling where, as here, disentitlement prevents a fugitive from exploiting the civil process of a court whose criminal authority he has flouted. Accordingly, the judgment should be affirmed.

ARGUMENT

I. A DISTRICT COURT, IN A CIVIL FORFEITURE PROCEEDING, MAY VALIDLY STRIKE THE CLAIM OF A FUGITIVE FROM A RELATED CRIMINAL CASE

It is well established that the federal courts possess those inherent powers "which 'are necessary to the exercise of all others.'" *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link* v. *Wabash R.R.*, 370 U.S. 626, 630-631 (1962)); *Ex parte Peterson*, 253 U.S. 300, 312 (1920). While the exercise of inherent powers is bounded by rights guaranteed by the Constitution, by statutes or

written rules of the court, and by principles of reasonableness, see *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988); *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), those powers constitute "a sizeable reservoir of authority available * * * to manage [courts'] civil dockets aggressively in order to achieve fair results efficiently." Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805, 1819 (1995).

The inherent powers include the authority "to compel the appearance and testimony of witnesses," *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966), to ensure "compl[iance] with document discovery," *International Union* v. *Bagwell*, 114 S. Ct. 2552, 2560 (1994), and to "use [the court's] processes to induce compliance with [] supplemental order[s] reasonably issued in aid of execution" of the judgment, *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 44 (1954). Because litigants' acts that "impede the court's ability to adjudicate the proceedings before it * * * touch upon the core justification for" exercise of the courts' inherent powers, *Bagwell*, 114 S. Ct. at 2560, "the inherent power extends to a full range of litigation abuses," *Chambers*, 501 U.S. at 46. While "[t]he most prominent of these [inherent powers] is the contempt sanction," *Roadway Express*, 447 U.S. at 764, "[c]ourts traditionally have broad authority through means other than contempt—such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment—to penalize a party's failure to comply with the rules of conduct governing the litigation process," *Bagwell*, 114 S. Ct. at 2560. Similarly, a court can validly dismiss a suit for failure to prosecute if the plaintiff has been dilatory in pursuing his claim, *Link*, 370 U.S. at 630, or as a "sanction for conduct which abuses the judicial process," *Chambers*, 501 U.S. at 44-45; *Zebrowski* v. *Hanna*, 973 F.2d 1001, 1006-1007 (1st Cir. 1992) (Breyer, C.J.) (collecting cases).

The district court's decision to strike petitioner's claim in the civil forfeiture proceeding, because he was a fugitive from a closely related criminal case, was a valid exercise of that court's inherent authority to manage its affairs "so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631. A long line of this Court's decisions holds that appellate courts have inherent authority, "[i]n the absence of specific provision to the contrary in the statute under which [the defendant] appeals," *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam); see also *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199, 1203-1204 (1993); *Smith* v. *United States*, 94 U.S. 97 (1876), to dismiss the claims of a criminal fugitive, and that the exercise of that "disentitlement" authority is constitutional. See *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975) (per curiam); *Allen* v. *Georgia*, 166 U.S. 138, 140-142 (1897). That is the power at issue here. Because striking the claim of a fugitive claimant in a civil forfeiture proceeding promotes the recognized goals of the disentitlement doctrine, and because dismissal of such a claim is consistent with the Due Process Clause of the Fifth Amendment, the court of appeals, in agreement with the majority of courts of appeals to have considered the question, correctly held that the doctrine is applicable in this setting.[5]

[5] The Second, Ninth, Tenth, and Eleventh Circuits have applied the fugitive disentitlement doctrine in the context of *in rem* forfeiture proceedings. *United States* v. *Timbers Preserve*, 999 F.2d 452 (10th Cir. 1993); *United States* v. *Eng*, 951 F.2d 461 (2d Cir. 1991); *United States* v. *One Parcel of Real Estate*, 868 F.2d 1214 (11th Cir. 1989); *United States* v. *$129,374*, 769 F.2d 583 (9th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); *United States* v. *$45,940*, 739 F.2d 792 (2d Cir. 1984). The Third Circuit, has noted its approval of that application of the rule. *United States* v. *Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974, 986 n.9 (1992) (dictum), cert. denied, 507 U.S. 985 (1993). The First Circuit, while acknowledging that the doctrine applies in civil cases, refused to apply the doctrine in a case in which not only was it unclear that the civil forfeiture was related to the criminal case but it also appeared that the claimant had no notice of the forfeiture proceeding. *United States* v. *Pole No. 3172*, 852 F.2d 636, 643-644 (1988). Only the Sixth and Seventh Circuits have concluded that the doctrine does not apply in civil forfeiture proceedings. *United States* v. *$83,320*, 682 F.2d 573, 576 (6th Cir. 1982); *United States* v. *$40,877.59*, 32 F.3d 1151 (7th Cir. 1994).

A. The Recognized Goals Of The Fugitive Disentitlement Rule Support Its Application In The Civil Forfeiture Setting

This Court has articulated a number of related rationales that support the "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) that a criminal defendant's fugitivity "disentitles [him] to call upon the resources of the Court for the determination of his claims." *Molinaro*, 396 U.S. at 366; see also *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887). First, refusing to hear a fugitive's claims "advances [the courts'] interest in efficient * * * practice" (*Ortega-Rodriguez*, 113 S. Ct. at 1204-1205; see also *Goeke* v. *Branch*, 115 S. Ct. 1275, 1277 (1995) (per curiam)) by permitting orderly and timely appeals, and it ensures that scarce judicial resources are not devoted to someone who is not "where he can be made to respond to any judgment [the Court] may render," *Smith*, 94 U.S. at 97; *Bonahan*, 125 U.S. at 692; *Allen*, 166 U.S. at 140; *Eisler* v. *United States*, 338 U.S. 189, 190 (1949) (per curiam). Second, the rule reflects the equitable principle that a litigant should not be permitted to invoke the legal process while simultaneously flouting the court's dignity and authority. See, *e.g.*, *Ortega-Rodriguez*, 113 S. Ct. at 1206. Third, the rule serves an incentive function by "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders." *Ortega-Rodriguez*, 113 S. Ct. at 1204 (quoting *Dorrough*, 420 U.S. at 537). Finally, the rule rests "in part on a 'disentitlement' theory" that construes flight as a waiver of a defendant's right to a procedural mechanism (an appeal) that, though furnished for the vindication of

important constitutional and other rights, is not itself required by the Constitution. *Ortega-Rodriguez*, 113 S. Ct. at 1204; *Allen*, 166 U.S. at 141; see also *Commonwealth* v. *Andrews*, 97 Mass. 543, 544 (1867). Those interests are significantly advanced by applying the doctrine to strike a claim filed in a civil forfeiture action by a fugitive from a related criminal case.

1. A fugitive's absence impairs the orderly and expeditious litigation of the civil forfeiture action, and constitutes a continuing offense to the dignity of the court. Claimants in civil forfeiture actions often will control the testimonial and documentary evidence most relevant to their contention that, despite the government's showing of probable cause, particular property should not be forfeited.[6] Yet, when the claimant is a fugitive from justice, "he can[not] be made to respond" to orders that the court may enter to test the basis for his contentions, *Smith*, 94 U.S. at 97, or indeed to control any other aspect of the litigation. The fugitive, therefore, may comply "or not, as he may consider most for his interest." *Ibid.*

These concerns are exacerbated by the severe demands placed on district courts, even under the best of circumstances, when cases require the collection of evidence abroad[7]—burdens that become intolerable when, as a

[6] In a civil forfeiture proceeding, once the government establishes probable cause to believe that property is forfeitable the burden of proof shifts to the claimants to demonstrate that the property is not forfeitable. *E.g.*, *United States* v. *Route 2, Box 472*, 60 F.3d 1523, 1526 (11th Cir. 1995); *United States* v. *Premises Known as 717 S. Woodward St.*, 2 F.3d 529, 531 (3d Cir. 1993); *United States* v. *Certain Real Property*, 986 F.2d 990, 995 (6th Cir. 1993). See generally 21 U.S.C. 885(a)(1).

[7] See, *e.g.*, *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522, 546 (1987). Collection of evidence overseas is almost always unlawful in the absence of prior approval by the foreign government and, when available by permission or pursuant to treaty obligations, it is far more difficult than

result of a party's fugitivity, a court can have no reasonable expectation of its ability to control the litigation. The claimant's physical absence while seeking to prevent the forfeiture immunizes him from the enforcement of discovery obligations and keeps him beyond the reach of the court's usual processes for supervising discovery and compelling attendance at hearings. For that reason, "the enforceability concern" of the disentitlement doctrine (Pet. Br. 14) supports its invocation in a civil forfeiture action; although the court has control over the res and therefore may enforce any eventual judgment, the court lacks power to ensure proper development of the record, and thus to protect the integrity of that judgment.

Petitioner emphasizes that he is a citizen of Switzerland and asserts that he merely declined to travel to the United States (Br. i, 17, 35). He therefore contends that applying the doctrine against him is inappropriate, because his refusal to meet the criminal charges is not "wrongful" (Br. 17) and, indeed, his presence in this country could not be "compelled in a civil action even if he were not a fugitive" (Br. 15). Petitioner, however, is also a citizen of the United States. See U.S. Const. Amend. XIV, § 1. "[T]he United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal." *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932). It is beyond doubt that "one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts * * * whenever he is properly summoned." *Id.* at 438. By virtue of that obligation, the district court could have summoned petitioner to the United States to testify as a witness even in a civil action

domestic evidence gathering (U.S. Attorney's Manual § 9-13.510 (Oct. 1988)) and "invariably takes longer" since "[r]outine tasks * * * requir[e] months to complete." *Id.* § 9-13.514; see also André M. Surena, *International Drug Traffic*, 84 Am. Soc'y Int'l L. 1, 2 (1991).

in which he had no interest whatsoever. See 28 U.S.C. 1783(a); see also 28 U.S.C. 1784(d) (failure to appear punishable by contempt fine of up to $100,000 which may be satisfied from any property the witness owns in this country).

Even if it were true that petitioner owed his allegiance solely to a foreign state, he is not a hypothetical litigant who appears before the district court in "good faith," *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209 (1958), and who seeks no "privileges because of [his] foreign citizenship which are not accorded domestic litigants in United States courts," *id.* at 211-212. Petitioner is a fugitive. See pp. 36-43, *infra*. His refusal to submit to the authority of the district court to try him for his crimes unmistakably conveyed to that court that he would comply with its process only as he saw fit, and that he would use his foreign residence as a shield against any coercive sanctions for noncompliance. Indeed, that message was confirmed when petitioner consented to being deposed in connection with his wife's claims, but only on condition that his testimony be taken in Switzerland, and be limited to certain topics of his choosing (which did not include his income from drug smuggling and distribution). See Pet. C.A. App. 200-201, 207-210. Petitioner's view that he is entitled to appear before the district court on terms dictated by him constitutes a direct "affront to the dignity of the court's proceedings." *Ortega-Rodriguez*, 113 S. Ct. at 1207. As this Court observed long ago, "[i]t is much more becoming to its dignity that the court should prescribe the conditions" under which a litigant will be permitted to appear before it, *Allen*, 166 U.S. at 141, and a fugitive's attempt to have that principle operate in reverse is "a contempt of [the court's] authority, to which no court is bound to submit," *ibid.*

2. Petitioner's status as a fugitive from criminal charges that have not been tried, but that are "directly related" (Pet. App. 4a-5a) to the civil forfeiture action,

increases, rather than eliminates, the court's interest in applying the disentitlement doctrine. The absence of a defendant from a pending criminal case implicates two special concerns. First, pretrial fugitivity imposes significantly greater burdens on the administration of criminal justice than does fugitivity that occurs after trial. Second, a criminal defendant who absconds before his criminal trial, yet seeks to avail himself of the court's broad discovery mechanisms in a related civil case, raises a heightened danger that the court's civil process will be misused.

a. Petitioner suggests (Pet. Br. 16 n.10) that his fugitive status is at most "an affront only to the criminal proceedings" and not to "the dignity of the civil forfeiture court's proceedings" (Br. 15) (emphasis omitted). The disentitlement doctrine, however, like other exercises of inherent authority, protects the orderly functioning of the *court*, see *Ortega-Rodriguez*, 113 S. Ct. at 1207, not the "dignity" of a particular case. Compare *In re McDonald*, 489 U.S. 180 (1989) (per curiam). By refusing to submit to the criminal jurisdiction of the court, petitioner has completely prevented his prosecution from going forward, see *Crosby* v. *United States*, 506 U.S. 255 (1993) (federal criminal trial may not begin *in absentia*), until such time, if ever, when he "himself [shall] be pleased to permit it," *Diaz* v. *United States*, 223 U.S. 442, 457 (1912). Petitioner's misconduct in granting himself an indefinite continuance has frustrated the district court's ability to dispense criminal justice and impaired the strong public interest in the speedy trial of indicted defendants, an interest that "exists separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972); *Flanagan* v. *United States*, 465 U.S. 259, 264-265 (1984); see also *United States* v. *MacDonald*, 435 U.S. 850, 862 (1978); *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) (noting the "necessity for preserving society's interest in the administration of criminal justice").

Petitioner's fugitivity also amounts to a self-help severance from his numerous co-defendants. Should he ever be brought to justice, that severance will surely defeat the strong "preference in the federal system for joint trials of defendants who are indicted together" (*Zafiro* v. *United States*, 113 S. Ct. 933, 937 (1993)) and will needlessly waste the scarce judicial resources of the very court whose assistance he seeks in the forfeiture action. Under established principles of the fugitive disentitlement doctrine, the court "ha[d] the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain." *Ortega-Rodriguez*, 113 S. Ct. at 1207. There is no reason to overlook those burdens on the court system merely because petitioner, by making himself unavailable, has so far prevented the government from convicting him of any crime.

Nor is there reason to credit his expressed doubts about the strength of the government's criminal case, based on the acquittal of a co-defendant. Br. 32 n.17; *id.* at 33 n.18. Petitioner's efforts to avoid being brought to justice are a more telling reflection of his appraisal of the strength of the government's evidence. See *Schuster* v. *United States*, 765 F.2d 1047, 1050-1051 (11th Cir. 1985). In any event, petitioner has been indicted by a grand jury whose basic function is to "protect[] citizens against unfounded criminal prosecutions" (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 423 (1983)), and that indictment, if valid on its face, "is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956). Petitioner's claim of innocence cannot be evaluated until and unless he submits to a trial, and "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). Our legal system provides petitioner with ample means for challenging

the government's ability to prove its case. Fugitivity is not one of them.[8]

b. The burdens that pretrial fugitivity imposes on the justice system, significant as they are, pale in comparison to the threat that such fugitivity poses to the integrity of the criminal justice system when the fugitive has access to the court's processes in a closely related civil case. In criminal cases, it has long been the policy of the law to limit the availability of discovery to narrow categories of information. See *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1052 (1961); see also *United States* v. *Ramos*, 27 F.3d 65, 67-68 (3d Cir. 1994). That policy minimizes the danger of witness intimidation, obstruction of justice, and perjury that can easily result when a criminal defendant has access to a roadmap of the prosecution's case, a danger that often is too subtle to be controlled successfully on a case-by-case basis.[9]

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[8] Amicus Public Citizen argues that application of the disentitlement doctrine in civil forfeiture actions "trumps the constitutionally-based presumption of innocence." Br. 8. That presumption has no application to the issue in this case. The presumption of innocence is a rule of evidence that applies in criminal cases, and on which criminal juries are instructed to ensure that their verdicts are based on proof beyond a reasonable doubt. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 532-533 (1979); see also *Coffin* v. *United States*, 156 U.S. 432, 458-459 (1895) ("[T]he presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty"). The fugitive disentitlement doctrine is not premised on any conclusion about guilt, but on the impact on the judicial system of a defendant's refusal to respond to charges.

[9] Rule 16 of the Federal Rules of Criminal Procedure explicitly does not permit discovery of "statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500," more commonly known as the Jencks Act. Fed. R. Crim. P. 16(a)(2). The Jencks Act provides that in criminal cases the statements of government witnesses shall not "be the subject of subpoena, discovery, or inspection until said witness has

In civil cases, by contrast, pretrial discovery is broadly available. Discovery "is not limited to matters that will be admissible at trial so long as the information sought 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 29-30 (1984) (quoting state counterpart to Federal Rule of Civil Procedure 26(b)(1)). Indeed, civil discovery is so expansive that "[m]uch of the information that surfaces * * * may be unrelated, or only tangentially related, to the underlying cause of action." 467 U.S. at 33; see *id.* at 35 (noting "opportunity" of litigants to obtain "incidentally or purposefully" information that can be abused).

Congress has recognized the dangers that the availability of civil process entails for related criminal proceedings. It has provided that the government may secure a stay of civil forfeiture proceedings that are related to a criminal prosecution that is pending in federal or state court. See 21 U.S.C. 881(i) ("The filing of an indictment or information alleging a violation of [federal narcotics laws], or a violation of State or local law that could have been charged under [federal law], which is also related to a civil forfeiture proceeding under [21 U.S.C. 881] shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding"); see also 18 U.S.C. 981(g); 19 U.S.C. 1305(d). As Congress recognized in codifying that rule, courts routinely granted such stays even before Section 881(i) was enacted to prevent a claimant from circumventing the limitations on criminal discovery. See S. Rep. No. 225, 98th Cong., 1st Sess. 215-216 (1983) (footnote omitted) ("Generally, the courts have been willing to grant such stays of civil forfeiture proceedings," since, "[a]bsent such a stay, the government may be compelled in the context of

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testified on direct examination in the trial of the case." 18 U.S.C. 3500(a).

the civil forfeiture action to disclose prematurely aspects of its criminal case"); see also *id.* at 215 n.57 (noting that "the government is, as a general rule, entitled to a stay of discovery in the civil action until disposition of the criminal matter").[10] When the claimant is a pretrial fugitive, however, a stay of the civil proceedings pending resolution of the criminal case is not a practical

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[10] See also *United States* v. *Mellon Bank, N.A.*, 545 F.2d 869, 873 (3d Cir. 1976); *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963); Fed. Supp. R. Civ. P. C(3) advisory committee's note (1985 Amendment) ("[T]he forfeiture hearing could be misused by the defendants [in parallel criminal prosecution] to obtain by way of civil discovery information to which they would not otherwise be entitled"). In keeping with the concerns reflected in the legislative history of Section 881(i), district courts routinely stay civil forfeiture proceedings on the basis of the government's representation that the related criminal case must be protected from potentially broad civil discovery. *E.g.*, *United States* v. *Michelle's Lounge*, No. 91 C 5783, 1992 WL 194652, at *5 (N.D. Ill. Aug. 6, 1992) ("Conducting civil discovery while the related criminal investigation is continuing would compromise that investigation"), appeal dismissed in part, vacated and remanded in part on other grounds, 39 F.3d 684 (7th Cir. 1994); *United States* v. *Premises & Real Property at 297 Hawley St.*, 727 F. Supp. 90, 91 (W.D.N.Y. 1990) (good cause shown where stay necessary to protect criminal case from "potentially" broad discovery demands of claimant/defendant); *United States* v. *One Single Family Residence Located at 2820 Taft St.*, 710 F. Supp. 1351, 1352 (S.D. Fla. 1989) (stay granted where "scope of civil discovery could interfere with the criminal prosecution"); *United States* v. *A Parcel of Realty Commonly Known as 4808 S. Winchester*, No. 88 C 1312, 1988 WL 107346, at *2 (N.D. Ill. Oct. 7, 1988) (Rovner, J.) (stay justified because "the possibility exists that any civil discovery provided * * * could be used by [the defendant/claimant] in the criminal case"); but see *In re Ramu Corp.*, 903 F.2d 312, 320 (5th Cir. 1990) (more specific "showing of the harm" that the government may suffer is required, and "there must be some weighing of the equities involved"); *United States* v. *Leasehold Interests in 118 Ave. D*, 754 F. Supp. 282, 287 (E.D.N.Y. 1990) (same); *United States* v. *$151,388*, 751 F. Supp. 547, 550-551 (E.D.N.C. 1990) (invoking four-part standard used for preliminary injunctions).

way of protecting the interests of the criminal process. Indeed, a stay of the civil proceedings until such time as the criminal trial can be held would effectively terminate the civil action in favor of the fugitive claimant—allowing him, by his misconduct, to defeat the government's showing of probable cause for forfeiture and thus effectively to thwart two Acts of Congress instead of only one.

Thus, if the civil action must proceed and be fully litigated, as proposed by petitioner, a fugitive claimant will be able, even while flouting the judiciary's authority to try him for his crimes, to use the coercive power of the court to conduct the type of "broad-ranging preliminary inquiry" (*Harris* v. *Nelson*, 394 U.S. 286, 297 (1969)) that "could substantially hamper the criminal proceeding * * * and may provide improper opportunities for [him] to discover the details of * * * [the] pending criminal prosecution" (*United States* v. *$8,850*, 461 U.S. 555, 567 (1983)). The fugitive-claimant can then "profit from his own wrong" (*Illinois* v. *Allen*, 397 U.S. 337, 345 (1970)) in two ways. First, he postpones his criminal trial, and thus gains the tactical advantages that flow from the possibility that evidence will be lost or that the passage of time will render the prosecution's witnesses "more easily impeachable." *Flanagan* v. *United States*, 465 U.S. at 264; see also *Vasquez* v. *Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting). Second, he enlists the court's help in the interim to probe the extent to which the prosecution's case may be undermined by contrived or perjured testimony—enabling him, should he find it advantageous to permit the trial to proceed, "to frustrate the truth-seeking function of [that] trial by presenting [a] tailored defense[] insulated from effective challenge." *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.7 (1976).

That is plainly a danger that no court is bound to tolerate. "After all, the court * * * has a vital interest in protecting the trial process from the pollution of perjured testimony." *Taylor* v. *Illinois*, 484 U.S. 400, 417 (1988). Thus, application of the disentitlement doctrine to a civil forfeiture claimant who successfully avoids a related criminal prosecution not only "encourages [his] voluntary surrender[]," *Ortega-Rodriguez*, 113 S. Ct. at 1204, but also ensures that he will not use the court as an instrument of further wrong. It hardly needs stating that that interest is quite a bit weightier than the concern with "discourag[ing] the felony of escape," *ibid.*, that appellate courts have long invoked to support the disentitlement doctrine. The felony of escape gravely affronts the court's dignity, but it does not make the court an unwilling participant in the wrongdoing. That danger of frustrating a closely related criminal case, which cannot proceed to trial and judgment precisely because of the fugitive's absence, justifies the adoption of a "generally applicable rule[] [of disentitlement] to cover [this] specific, recurring situation[]." *Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23.[11]

3. Relying on *United States* v. *Sharpe*, 470 U.S. 675 (1985), petitioner also contends that the fugitive disentitlement doctrine may not be invoked when the fugitive appears before the court in "a purely defensive" position. Br. 17-19. That contention is doubly flawed, because (i) *Sharpe* stands for no such proposition, and (ii) the "purely defensive" label does not accurately describe the role petitioner seeks to play in the district court.

The respondents in *Sharpe* became fugitives after the Court had granted the government's petition for certiorari

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[11] The Court need not consider in this case whether circumstances exist that would justify a court in exercising discretion not to disentitle a pretrial fugitive claimant in a civil forfeiture action, notwithstanding the potential for prejudicing a related criminal case. The court of appeals recognized that the disentitlement doctrine permits the exercise of discretion in individual cases, Pet. App. 8a, but held that petitioner waived any such claim by failing to argue that issue on appeal. *Ibid.*

to review a judgment reversing their criminal convictions on Fourth Amendment grounds. In ruling for the government on the Fourth Amendment issue, the Court rejected (470 U.S. at 681 n.2) the suggestion of two Justices that the government should prevail *instead* on the basis of the respondents' fugitivity, *i.e.*, that the judgment should be vacated and the cause remanded for dismissal of the respondents' appeals. See *id.* at 688 (Blackmun, J., concurring); *id.* at 721-728 (Stevens, J., dissenting). *Sharpe* makes clear that a criminal defendant cannot, by absconding, foreclose this Court's review of an important legal issue that the Court agreed to hear on a petition filed by the government. The brief discussion in *Sharpe* declining to apply the disentitlement doctrine has little or no relevance to the very different situation presented in this case: whether a district court may rely on that doctrine to prevent a defendant who has become a fugitive from calling upon its resources in a related civil action.[12]

In any event, petitioner's description of his posture as "purely defensive" does not comport with the facts. Petitioner seeks more than the opportunity to show—*i.e.*, merely point out—to the district court any respect in which the government has failed to meet its threshold burden of establishing probable cause for the forfeiture. There is no question that the government met that burden. See Pet. App. 13a. He seeks instead to raise affirmative claims to dispute the government's right to the properties despite its showing. In aid of that effort, he would "call upon the resources of the [c]ourt" (*Molinaro*, 396 U.S. at 366) to compel the production of documents, answers

[12] Nor does *Sharpe* suggest that the disentitlement doctrine will not be applied "when the fugitive is responding to government action." Pet. Br. 18 (quoting *United States* v. *$40,877.59*, 32 F.3d 1151, 1154 (7th Cir. 1994)). The fugitives in *Sharpe* did not "respond" at all in this Court; rather, the Court directed their counsel to file an *amicus curiae* brief in support of the judgment. 470 U.S. at 681 n.2.

to interrogatories, or the deposition testimony of witnesses (whether or not they were associated with the government), see Fed. R. Civ. P. 26-37, all of which are purely "a matter of legislative grace" (*Seattle Times*, 467 U.S. at 32) rather than constitutional right.[13] In our view, that extensive use of the district court's resources may not fairly be labeled "purely" defensive.

B. Striking The Claim Of A Fugitive Claimant Does Not Offend The Due Process Clause Of The Fifth Amendment

Petitioner also contends (Br. 19-27) that the disentitlement rule developed by appellate courts may not be applied to claimants in civil forfeiture proceedings, because, unlike criminal defendants who have no constitutional right to an appeal, those claimants have a due process right to be heard in their defense. That claim fails because petitioner was not deprived of the constitutional right he asserts.

1. The Due Process Clause of the Fifth Amendment requires that a litigant be afforded notice and the opportunity for a hearing before being deprived of a property interest. *E.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). That, "of course," does not mean that "the defendant in every civil case [must] *actually have* a hearing on the merits." *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971) (emphasis added); accord *Logan* v. *Zimmer-*

[13] The course of litigation taken by Karyn Degen in this case after petitioner's claim was ordered struck is a fair indication of the steps petitioner would likely have taken—and the resources of the court he would have employed—had he not been disentitled. Karyn Degen called on the court to seek a protective order to prevent her from having to come to Nevada for her deposition (see Pet. C.A. App. 540); to compel answers to extensive interrogatories (*id.* at 211-212, 223-231, 544); to seek (and, if necessary, compel) the depositions of nearly 20 people (*id.* at 541-542, 544); and to move to stay civil proceedings until disposition of related criminal charges (*id.* at 544).

man Brush Co., 455 U.S. 422, 437 (1992) ("Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case"). Rather, all that "the Constitution does require is 'an *opportunity*' " for a hearing. *Boddie*, 401 U.S. at 378 (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)); *Logan*, 455 U.S. at 437; see also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Thus, the government "may erect reasonable procedural requirements" (*Logan*, 455 U.S. at 437) for triggering the right to be heard or defend, requiring, for example, that a claim be brought, or an appearance made, within a prescribed time period, *e.g. Boddie*, 401 U.S. at 378; *Windsor* v. *McVeigh*, 93 U.S. 274, 278 (1876), or that reasonable filing fees be paid, *Logan*, 455 U.S. at 437; *United States* v. *Kras*, 409 U.S. 434, 446-449 (1973), or that a litigant comply with orders for the production of evidence, *Boddie*, 401 U.S. at 378; *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909).

Without violating due process, a court may dismiss a case, or enter default judgment, for noncompliance with such rules. *Logan*, 455 U.S. at 437; *Hammond Packing*, 212 U.S. at 352-354; *Windsor*, 93 U.S. at 278. As this Court has noted, "[t]he deprivation of a litigant's right to present a defense has been upheld * * * as a result of the litigant's failure to produce evidence, his violation of a rule of procedure, or other action justifying a judgment of default against him." *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. at 42 n.5. A requirement that a litigant submit to our country's criminal jurisdiction before he may have a hearing on the merits of a related civil case is not meaningfully different from those procedural requirements; like those rules, it rationally advances the court's interest in orderly procedure by imposing a requirement with which a litigant can readily comply. Striking the fugitive's claim for noncompliance accordingly does not offend any principle of *due* process.

Moreover, even if the due process issue is characterized as one of "waiver," petitioner is wrong to contend that any waiver of his rights is invalid unless it meets the stringent standard of a voluntary, knowing act done with sufficient awareness of the consequences. Br. 27-28 (citing, *inter alia*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). That heightened standard of waiver need not be met even for a court to conduct a valid criminal trial when a defendant voluntarily absents himself after the trial has begun. *Taylor* v. *United States*, 414 U.S. 17, 19-20 (1973) (per curiam); see *United States* v. *Gagnon*, 470 U.S. 522, 528-529 (1985) (per curiam). It surely has no relevance to consequences visited on a claimant to property in a civil case, imposed upon him by virtue of his status as a fugitive who has flouted the court's authority. And this Court has never insisted, before applying the doctrine, on a showing that a fugitive from criminal justice had actual knowledge of the prospect of disentitlement.

Petitioner also claims that the doctrine should be confined to appeals from criminal convictions, because in those cases the defendant already has had "a fair hearing." Br. 23-24. Appeals, however, are fundamentally based on the notion that "[c]ourts do make mistakes." *Willy* v. *Coastal Corp.*, 503 U.S. 131, 139 (1992). In criminal cases, the point of an appeal is to claim that the defendant stands improperly convicted; *i.e.*, that he did *not* have a "fair hearing." See *Evitts* v. *Lucey*, 469 U.S. 387, 402 (1985); *Griffin* v. *Illinois*, 351 U.S. 12, 18-19 (1956). In upholding disentitlement in that context, the Court necessarily assumes that the claims are at least substantial; there would be no point to the doctrine if it reached only appeals that the defendant would lose on the merits. See *Sharpe*, 470 U.S. at 724 (Stevens, J., dissenting) ("Every application of the * * * rule necessarily assumes that an appeal may be meritorious"). Indeed, that fact highlights the implausibility of petitioner's attempt to accord to property interests more elaborate

protections than the disentitlement doctrine accords to liberty.[14] See *Conforte* v. *Commissioner*, 692 F.2d 587, 589-590 (9th Cir. 1982) (collecting authorities) ("the rule should apply with greater force in civil cases where an individual's liberty is not at stake"), stay denied, 459 U.S. 1309 (1983).

2. Petitioner relies (Br. 24-27) on a trio of 19th-century decisions—*McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259 (1871), *Windsor* v. *McVeigh*, *supra*, and *Hovey* v. *Elliott*, 167 U.S. 409 (1897)—that he believes establish his absolute right to a hearing at which he may press the merits of his claims. Those cases do not help him.

The two *McVeigh* cases arose from a Civil War era law authorizing forfeiture of land owned by persons in active rebellion who refused to cease participation in the rebellion within 60 days of a presidential proclamation. After the government commenced forfeiture proceedings, McVeigh appeared through counsel and filed a claim and answer. 78 U.S. at 261. The government moved to strike his pleadings, because it appeared from McVeigh's answer that he was "a resident of the city of Richmond, within the Confederate lines, and a rebel." *Ibid.* The court granted the motion, and, in the absence of any claim and answer, the government won a default judgment. This Court reversed, holding that, while an alien enemy might be barred from bringing suit in the courts of a hostile country, he nonetheless had a right to pre-

[14] The different nature of the rights implicated by civil and criminal trials also disposes of petitioner's claim that "the government would never pretend that * * * it could 'disentitle' " him by seeking a default judgment in the criminal case. Br. 23. The Sixth Amendment, which applies in criminal cases only, requires a jury trial absent a valid personal waiver. See, *e.g.*, *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2080 (1993); *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966). The Due Process Clause, by contrast, guarantees only an "opportunity" for a hearing; as we have noted, petitioner was afforded that opportunity.

sent a defense when sued in federal court. *Id.* at 267. Five years later in *Windsor* v. *McVeigh*, *supra*, the Court reaffirmed that the original forfeiture of property in *McVeigh* v. *United States* was void because the court had not permitted the claimant any opportunity to be heard.

Neither of the *McVeigh* cases establishes an absolute "right to defend" irrespective of a party's compliance with reasonable rules of court. There was no allegation in those cases that the claimant had indicated his intention to appear on his own terms, or that the court's ability to function fairly and efficiently had been impaired in any respect by acts or omissions over which he could fairly be deemed to have control.[15] Indeed, the Court explicitly recognized that due process entitled the claimant only to "an *opportunity* to be heard," *Windsor*, 93 U.S. at 280 (emphasis added), that the right to defend could be subject to reasonable procedural restrictions, *id.* at 278, and that, upon failure to comply with those procedures, "the default of * * * possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true," *ibid.*

Hovey v. *Elliott* involved a collateral attack in the New York state courts on a default judgment that had been entered in the District of Columbia courts. In the

[15] There was no indication that the court had any objection to McVeigh's appearance through counsel. If the court had insisted on McVeigh's personal appearance, and struck his claims upon his failure to do so, that action would have provoked "substantial constitutional questions" (*Societe Internationale*, 357 U.S. at 210), but only because it would have been effectively impossible for him to comply. Cf. *Hicks* v. *Feiock*, 485 U.S. 624, 638 n.9 (1988); *United States* v. *Rylander*, 460 U.S. 752, 757 (1983). As this Court has recognized, both belligerents in that conflict forbade their citizens to travel to (or have any contact with) the other belligerent. *Lasere* v. *Rochereau*, 84 U.S. (17 Wall.) 437, 439 (1873); *Dean* v. *Nelson*, 77 U.S. (10 Wall.) 158, 172 (1870) ("The defendants in the proceedings * * * were within the Confederate lines at the time, and it was unlawful for them to cross those lines").

earlier case, the defendants had failed to comply with a court order that they pay certain funds into the registry of the court. 167 U.S. at 411. The court issued an order to show cause why they should not be "punished as for a contempt of court" (*ibid.*) for their failure to comply. When the defendants again failed to pay over the funds to the court, the court struck their answer from the record and entered a default judgment against them. *Id.* at 411-412. Speaking through the first Justice White, this Court affirmed the New York state court's refusal to honor that default judgment, concluding that the District of Columbia courts had lacked the authority "to deny all right to defend an action and to render decrees without any hearing whatever" for failure to obey an order of the court. *Id.* at 414; see also *id.* at 435.

This Court's cases make clear that *Hovey* cannot bear the broad reading advanced by petitioner, because 12 years after *Hovey*, the Court "substantially modified" (*Societe Internationale*, 357 U.S. at 209) its holding in *Hammond Packing Co.* v. *Arkansas, supra.*[16] In an action under state antitrust law, the defendant in *Hammond Packing* refused to produce documents and witnesses before a commissioner as ordered by a state court. The court then struck the defendant's answer for noncompliance with its order, as authorized by state law, and entered a default judgment against it. 212 U.S. at 339-340 & n.1. Speaking again through Justice White, this Court concluded that *Hovey* was not controlling and affirmed the judgment. The Court noted that "[t]he ruling in *Hovey* v. *Elliott* was that to punish for contempt by striking an answer from the files and condemning, as

[16] See also *HMG Property Investors, Inc.* v. *Parque Industrial Rio Canas, Inc.*, 847 F.2d 908, 918 n.14 (1st Cir. 1988) ("*Hovey* was expressly limited by the decision in [*Hammond Packing*] and impliedly limited by * * * the Court's more modern pronouncements"); *G-K Properties* v. *Redevelopment Agency of City of San Jose*, 577 F.2d 645, 648 (9th Cir. 1978) (Kennedy, J.) (same); *Norman* v. *Young*, 422 F.2d 470, 473 (10th Cir. 1970) (same).

default, was a denial of due process of law." *Id.* at 349; see also *id.* at 350 (*Hovey* "involved a denial of all right to defend *as a mere punishment*") (emphasis added); *id.* at 351 (*Hovey* represented "mere punishment"). By contrast, striking the defendant's answer was justified by a presumption—absent from the statute (see *id.* at 339 n.1), but supplied by the Court—that "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.* at 351; compare *Taylor*, 484 U.S. at 414-417 (permissible to preclude testimony of alibi witness in criminal case, when it is "reasonable to presume" that defendant's failure to comply with notice-of-alibi rule "conceal[s] a plan to present fabricated testimony"); *Baxter* v. *Palmigiano*, 425 U.S. 308, 317-319 (1976) (court may draw adverse inference from invocation of self-incrimination privilege in a civil case).

This Court's cases since *Hammond Packing* leave no doubt that it is perfectly consistent with due process to impose "litigation ending" sanctions when, as petitioner did through his fugitivity, a party has manifested his unwillingness to comply with the court's orders for the conduct of the litigation, see 4A James Wm. Moore, *Moore's Federal Practice* ¶ 37.03[2], at 37-70 (1995) ("When there is a refusal to supply information on any topic * * * it is reasonable to apply the presumption to the party's entire case"); see also *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (as a sanction for a defendant's failure to produce evidence relevant to personal jurisdiction, court properly deemed such jurisdiction established), particularly when the court can infer that the party has proceeded in bad faith. See *Roadway Express*, 447 U.S. at 767 n.14; *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam). By his counsel's own admission, petitioner was "the only person" with knowledge of the facts on which he and his wife proposed to base their attack on the

government's forfeiture case. See 2/1/93 Tr. 8.[17] His readiness to use his fugitivity to control the manner in which those facts would be placed before the district court justifies a presumption regarding "the want of merit in [his] asserted defense[s]." *Hammond Packing*, 212 U.S. at 351; see also *Ali* v. *Sims*, 788 F.2d 954, 959 (3d Cir. 1986) (noting that cases upholding default judgments as a discovery sanction "generally entail conduct far less egregious than a flight from justice").

3. Petitioner argues that the government's forfeiture case is insubstantial and that he will prevail in the event of a remand on one of several purportedly meritorious defenses. Br. 31-33; see also *id.* at 15 n.9. Petitioner's wife raised each of the same defenses, and an "innocent owner" claim in addition. Compare J.A. 31-32 and Pet. C.A. App. 136-140 (petitioner's amended answer) with Pet. C.A. App. 404-410 (Karyn Degen's answer) and *id.* at 130-134 (amended answer). Although she was given a "full and fair opportunity to litigate" (*Montana* v. *United States*, 440 U.S. 147, 153 (1979)) those claims, was afforded numerous extensions of time to do so (Pet. App. 13a-14a), and was warned of the consequences of default (*id.* at 9a-10a), she failed to support them. That failure not only raises considerable doubt about the merits of those arguments, but also resulted in the entry of a judgment against her that was affirmed by the court of appeals, and that became final when she failed to seek further review in this Court. Under ordinary principles of claim preclusion, that final judgment binds her and her privies, see, *e.g.*, *Morris* v. *Jones*, 329 U.S. 545, 550-551 (1947); *Riehle* v. *Margolies*, 279 U.S. 218, 225 (1929); *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U.S. 683, 691 (1895); *SMA Life Assurance Co.* v. *Sanchez-Pica*, 960 F.2d 274, 275 (1st Cir.), cert. denied, 506 U.S. 872 (1992), of which petitioner

[17] Petitioner has lodged a copy of that transcript with the Clerk of the Court.

surely is one.[18] On that ground alone, it is difficult to assign a high likelihood of success to petitioner's chances on remand in the event that this Court vacates the court of appeals' ruling as to him.[19]

[18] Petitioner's status as a privy flows from his marriage to Karyn and their status as purported co-owners of the seized property, see *Cotton* v. *Federal Land Bank of Columbia*, 676 F.2d 1368, 1370 (11th Cir.), cert. denied, 459 U.S. 1041 (1982); see also *Sparks Nugget, Inc.* v. *Commissioner*, 458 F.2d 631, 639 & n.4 (9th Cir. 1972), cert. denied, 410 U.S. 928 (1973); *Smith* v. *United States*, 254 F.2d 865, 869 (6th Cir. 1958), and their representation by common counsel throughout the proceedings, see *e.g.*, *Sondel* v. *Northwest Airlines, Inc.*, 56 F.3d 934, 940 (8th Cir. 1995); *Conte* v. *Justice*, 996 F.2d 1398, 1402 (2d Cir. 1993) (New York law); *1488, Inc.* v. *Philsec Inv. Corp.*, 939 F.2d 1281, 1290 (5th Cir. 1991); *Alpert's Newspaper Delivery, Inc.* v. *New York Times Co.*, 876 F.2d 266, 270 (2d Cir. 1989); see also *Smith*, 254 F.2d at 869 (collateral estoppel).

[19] In any event, petitioner's stated defenses rest on erroneous legal premises. His claim that the forfeitures are barred by the statute of limitations is based on the view that the date when the property was acquired controls (Br. 31); the limitations period runs instead from the discovery of the offense that gives rise to the forfeiture. See 19 U.S.C. 1621; *United States* v. *Premises Known as 318 S. Third St.*, 988 F.2d 822, 825-826 (8th Cir. 1993). His argument that "the government's complaint is premised on a retroactive application of" the forfeiture laws (Br. 32) also is based on the assumption that the date when the property was acquired, rather than the date when its illegal use occurred, is controlling. The evidence relied on by the government shows that petitioner's participation in the smuggling enterprise continued well past the effective dates of both 21 U.S.C. 881(a)(6) (November 10, 1978) and 881(a)(7) (October 12, 1984). See J.A. 108-114, 138, 160-161. Moreover, the retroactive application of those provisions would not violate the Ex Post Facto Clause. See 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 4.03[4][f], at 4-120.14 (1995); see also Ron Champoux, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 Hastings Const. L.Q. 247, 251 n.38 (1992).

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT PETITIONER WAS A FUGITIVE FROM CRIMINAL JUSTICE

Petitioner argues (Br. 34-41) in the alternative that the district court erred in concluding that he was a "fugitive." Petitioner argues that his refusal to return to this country to stand trial on criminal charges could not make him a fugitive either under "the ordinary meaning of * * * the word 'fugitive'" or "the conventional legal concept of 'fugitive from justice' as developed in several analogous areas of the law." Br. 35-36. According to petitioner, the disentitlement rule should be applied only when the defendant already has been convicted of a crime or, at least, when his refusal to appear for his criminal trial amounts to a separate criminal offense. Those contentions are incorrect.

1. The dictionary definition of fugitive does not, contrary to petitioner's claim (Br. 9, 37), require a showing that a person left the United States with the specific intent of avoiding prosecution. While that sort of conduct doubtless is *included* within the ordinary understanding of fugitivity, that common understanding also encompasses anyone who is absent from the jurisdiction in which he is wanted, especially if he has knowledge that criminal charges have been lodged against him. See, *e.g.*, *Webster's Third New International Dictionary* 918 (1986) (def. 1b: "fugitive" is "one who tries to elude justice"); *ibid.* ("fugitive from justice: one who having committed or being accused of a crime in one jurisdiction is absent for any reason from that jurisdiction; *specif*: one who flees to avoid punishment"); 1 Samuel Johnson, *A Dictionary of the English Language* (1755) ("fugitive" includes "[o]ne who takes shelter under another power from punishment").

Nor is petitioner's view required as a matter of "logic[]" (Br. 37), since it is hardly obvious that there is a "logical distinction between the person who leaves to avoid prosecution and the person who, once gone, refuses to return for the same reason, to avoid prosecution." *United States* v. *Spillane*, 913 F.2d 1079, 1081 (4th Cir. 1990); see also *Jhirad* v. *Ferrandina*, 536 F.2d 478, 483 (2d Cir.) (same), cert. denied, 429 U.S. 833 (1976). Indeed, petitioner himself conceded before the Ninth Circuit panel that the district court "properly" found him to be a fugitive—a concession that strongly undermines his current claim that the definition he proposes is the only "[]tenable" one (Br. 37) as a matter of language and logic.[20]

2. Petitioner's position also lacks support in other areas of the law in which the concept of fugitivity is relevant.

a. The Constitution provides for the return for prosecution of persons "who shall flee from Justice, and be found in another State," U.S. Const. Art. IV, § 2, Cl. 2, and Congress has, since 1793, provided a procedure for the return of such "fugitive[s] from justice" for prosecution. See 18 U.S.C. 3182 (formerly codified at 18 U.S.C. 662 (1946) and Rev. Stat. § 5278 (1878)); see generally *Puerto Rico* v. *Branstad*, 483 U.S. 219, 223 n.2 (1987); *South Carolina* v. *Bailey*, 289 U.S. 412, 419

[20] Petitioner's appeal to the Ninth Circuit was predicated solely on the basis that, as a result of his arrest by Swiss authorities years after the district court's order, he was effectively "imprisoned in the related criminal case and [therefore] [wa]s no *longer* a fugitive for purposes of disentitlement." Brief of the Appellants at 30, *United States* v. *Real Property Located at Incline Village*, No. 93-16996 (9th Cir.) (emphasis added). At oral argument before the court of appeals, petitioner's counsel stated:

> Brian Degen is a resident of Switzerland. When the criminal complaint was filed he decided not to return [to the United States]. After the complaint was filed and the answer, the government moved for summary judgment on the fugitive disentitlement doctrine. And the [district] court found—*and I think properly so*—that because [Degen] had failed to return, he was a fugitive.

(Emphasis added). We have lodged a copy of a tape of the oral argument with the Clerk of the Court.

(1933). In construing those provisions, this Court has time and again embraced a concept of fugitivity at odds with that advocated by petitioner:

> To be regarded as a fugitive from justice it is not necessary that one shall have left the State in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there * * * a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another State.

Hogan v. *O'Neill*, 255 U.S. 52, 56 (1921) (construing Rev. Stat. § 5278); accord *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 133 (1917) ("one who leaves the demanding State before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, * * * is nevertheless decided to be a fugitive from justice within" the meaning of Art. IV, § 2, Cl. 2, and former Revised Statutes § 5278); *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911) ("all that is necessary to convert a criminal * * * into a fugitive from justice is that he should have left the State after having incurred guilt there"); *Appleyard* v. *Massachusetts*, 203 U.S. 222 (1906) (collecting authorities); *Roberts* v. *Reilly*, 116 U.S. 80, 97 (1885).[21]

[21] Relatedly, the President has exercised his treaty power (see U.S. Const. Art. II, § 2, Cl. 2) to enter into extradition treaties with foreign nations. See, *e.g.*, 18 U.S.C. 3181 note (listing of bilateral extradition treaties entered into by the United States). Our extradition treaties generally do not distinguish between persons who left the United States with the intent to avoid prosecution, and those who left for legitimate reasons but refuse to return to face criminal charges. The coverage of both classes implicitly recognizes that an absent defendant's intent in leaving the country is not relevant to the societal interest that he return and face justice for crimes committed here. See 2 M. Cherif Bassiouni, *International Extradition: United States Law & Practice* 520 (2d ed. 1987) ("The term 'fugitive' as used in extradition treaties refers to any person who has left the state in which the alleged crime was committed for whatever reason").

b. Similarly, the weight of authority under 18 U.S.C. 3290, the statute that tolls the limitations period as to "any person fleeing from justice," does not, as petitioner believes, support the narrow definition of fugitivity that he proposes. See Br. 38-39 (arguing that petitioner's conduct was "sufficiently innocent" that it would not trigger Section 3290's tolling provision). Petitioner asserts that in *Streep* v. *United States*, 160 U.S. 128, 133 (1895), this Court "suggested" that a predecessor statute "*required* a showing of 'flight with the intention of avoiding being prosecuted.'" Br. 38 (emphasis added). The Court actually stated in *Streep*, however, that while it was "unnecessary * * * to undertake to give an exhaustive definition" to the phrase "fleeing from justice," it was "*sufficient* that there [be] a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not been actually begun." 160 U.S. at 133 (emphasis added).

The Court in *Streep* went on to note that

> there can be no doubt that, in this respect, section 1045 of the Revised Statutes [the tolling statute] must receive the same construction that has been given to section 5278 [the interstate extradition statute] by this court, saying: "To be a fugitive from justice, * * * it is *not necessary that the party charged should have left the State* * * * after an indictment found, or *for the purpose of avoiding a prosecution anticipated or begun*, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought * * * to answer for his offense, he has left its jurisdiction and is found within the territory of another." *Roberts* v. *Reilly*, 116 U.S. 80, 97 [(1885)].

160 U.S. at 134 (emphasis added). The courts of appeals have differed on the issue whether *Streep* means that the statute of limitations may be tolled without any

showing that the defendant *ever* entertained an intent to avoid prosecution (*i.e.*, under a "mere absence" test), and most courts of appeals have required that the government establish that the defendant intended to avoid prosecution. Petitioner errs, however, when he suggests that "[a] majority of the circuits" (Br. 38-39, citing cases from the First, Fifth, and Seventh Circuits) has endorsed his restrictive view that the requisite intent must be shown to have existed as a motivating force at the time he *departed*, rather than at any time during which he was *absent* from, the jurisdiction. So far as we can determine, every court of appeals would reject petitioner's claim that, as a matter of law, he could not be found to be "fleeing from justice" under Section 3290 on proof of his absence from the jurisdiction coupled with his refusal to surrender to face criminal charges.[22]

[22] Two circuits (the Eighth and District of Columbia Circuits) merely require a showing that the fugitive resides in another jurisdiction than that in which the crime took place. See *In re Assarsson*, 687 F.2d 1157, 1162 (8th Cir. 1982); *Green* v. *United States*, 188 F.2d 48 (D.C. Cir.), cert. denied, 341 U.S. 955 (1951); see also *United States* v. *Singleton*, 702 F.2d 1159, 1169 n.32 (D.C. Cir. 1983) (noting circuit precedent and reserving question whether "mere absence" rule retains vitality). Two others (the Second and Ninth Circuits) apply the tolling provision to persons who, like petitioner, purportedly leave the United States for some legitimate purpose, but who remain abroad in an effort to thwart prosecution. See *United States* v. *Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994) (defendant lived openly and notoriously in Mexico), cert. denied, 115 S. Ct. 742 (1995); *id.* at 1073 (Farris, J., concurring) (defendant "knew he was wanted by the authorities and *intentionally thwarted* arrest by remaining abroad"); *United States* v. *Catino*, 735 F.2d 718, 722-723 (2d Cir.) (defendant contested extradition instead of consenting to return to the United States), cert. denied, 469 U.S. 855 (1984). The Tenth and Eleventh Circuits have indicated their agreement with that position. See *United States* v. *Morgan*, 922 F.2d 1495, 1499 n.3 (10th Cir.) (dictum) (noting that defendant's knowledge that he is wanted, coupled with failure to submit to arrest, "is enough") (citing *United States* v. *Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976)), cert. denied, 501 U.S. 1207 (1991); *Schuster* v. *United States*, 765 F.2d 1047, 1050 (11th Cir. 1985) (citing Second Circuit's rule under Section 3290 in affirming application of disentitlement rule in civil tax case; "whatever [petitioner's] intent may have been when she left the United States, she has certainly since established her status as a fugitive from this nation's criminal process, particularly as of the moment she chose to resist extradition").

Moreover, the First and Fifth Circuit cases that petitioner cites at best are ambiguous on the point. See *Brouse* v. *United States*, 68 F.2d 294, 296 (1st Cir. 1933); *Donnell* v. *United States*, 229 F.2d 560, 565 (5th Cir. 1956) (relying on *Brouse* to conclude that "the purpose and intent of [the defendant's] *absence* is * * * to be inquired into by the jury") (emphasis added); see also *Jhirad*, 536 F.2d at 483 (relying on *Donnell*'s emphasis on the reasons for the defendant's "absence" to hold that no "meaningful distinction exists between those who leave their native country and those who, already outside, decline to return"). In any event, the Seventh Circuit, which according to petitioner (Br. 38) follows the same rule as those two circuits, would infer the requisite intent "where the defendant fails to surrender to authorities after learning of the charges against him." *United States* v. *Marshall*, 856 F.2d 896, 900 (1988) (collecting authorities).

c. Finally, petitioner relies (Br. 38) on 18 U.S.C. 1073, which makes it a crime to travel in interstate commerce intending "to avoid prosecution, or custody or confinement after conviction." Petitioner, however, offers no reason that would justify transposing the specific elements of that crime to the present context. Section 1073 is part of chapter 49 of Title 18, which is entitled "Fugitives From Justice." The first section of that chapter makes it a crime knowingly to "harbor[] or conceal[] any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest." 18 U.S.C. 1071. Thus, while the provision on which petitioner relies deals with one facet of the fugitivity problem, the legislative framework to which that provision belongs also manifests the understanding that one harbors a "Fugitive[] From Justice" by giving refuge to a person for whom criminal process has been issued and who has not

surrendered; a person, in short, who occupies the same position as petitioner. See also *Black's Law Dictionary* 671 (6th ed. 1990).[23]

3. Not only do the sources cited by petitioner fail to support his narrow concept of fugitivity, but his argument also misses the central issue: whether application of the fugitive disentitlement doctrine in a civil forfeiture action to one in petitioner's position furthers the equitable goals of that doctrine. The answer to that question does not turn on whether petitioner is guilty of "[b]ail-jumping, escape from custody," or other actions that are independently proscribed by the penal laws (Br. 39), since "one's misconduct need not necessarily have been of such a nature as to be punishable as a crime" before it may be noticed by a court of equity. *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945). Nor is it dispositive that "this Court has approved disentitlement *only* against persons who have already been convicted of crimes." Br. 35. Because the doctrine initially developed as a rule of criminal appellate practice, which necessarily presupposes

[23] Petitioner also argues (Br. 37) that, for purposes of the Gun Control Act of 1968, Congress specifically defined the phrase "fugitive from justice" narrowly. See 18 U.S.C. 921(a)(15). That definition of fugitivity, however, could reasonably be taken to reflect Congress's intent to depart from the meaning that courts would otherwise give to the concept as a matter of plain language and ordinary legal usage. In any event, the Gun Control Act's provisions do not throw much light on the precise scope of the fugitivity concept, because there is a division of authority on the meaning of the Act's provisions with respect to the very point urged by petitioner. Compare *United States* v. *Durcan*, 539 F.2d 29, 32 (9th Cir. 1976) (relied on by petitioner, Br. 37) with *Spillane*, 913 F.2d at 1081 (expressly disagreeing with *Durcan*; the defendant "purposefully stayed away from [the jurisdiction] to avoid facing the charges pending against him * * * [and] this alone is enough to support the assertion by the government that [he] [i]s a 'fugitive from justice' as defined by the statute").

an underlying criminal conviction, petitioner's observation amounts more to a description of the facts of this Court's cases than a reasoned argument for limiting the doctrine to that context.

The definition of fugitive status for the disentitlement doctrine must instead be informed by the purposes of that doctrine. Here, as the district court found, petitioner "knows that he is wanted by the police, but refuses to submit to arrest, even though he professes his innocence." Pet. App. 18a. He nonetheless seeks to litigate in absentia his claims in the related civil forfeiture action, a course of action that will predictably interfere with the orderly conduct of the civil litigation, while bidding fair to frustrate the government's interests in prosecuting him. Accordingly, as we have explained, the goals of the fugitive disentitlement doctrine are compellingly served by applying it in this case.[24]

III. PETITIONER'S CLAIMS THAT HE HAS CEASED BEING A FUGITIVE AND THAT THE GOVERNMENT'S "UNCLEAN HANDS" PRECLUDE DISENTITLEMENT DO NOT WARRANT RELIEF

Petitioner raises two additional claims that he contends warrant vacatur of the court of appeals' judgment. First, he contends (Br. 42-43) that by the time the district court entered its judgment, he was no longer a fugitive because he had by then been arrested by Swiss authorities in connection with a prosecution that the United States encouraged and that rests mainly on the allegations made

[24] Petitioner argues (Br. 40-41) that, if the Court accepts his claim that he must be shown to have intended to avoid prosecution at the time he left for Switzerland, the government should not be allowed an opportunity to meet that standard on remand. The Court's practice when legal error has been committed, however, is to remand for application of the correct standard, see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); see also *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111-112 (1964).

in the federal criminal indictment. Second, he argues (Br. 46-49) that the government misrepresented to the district court and the court of appeals the true nature of the Swiss proceedings, and that the government's "unclean hands" preclude application of the disentitlement doctrine to him. As we read his reply brief at the petition stage, petitioner expressly disclaimed even "mak[ing]" the former argument in his petition (Reply Br. 8); the latter claim appeared for the first time in his opening brief on the merits. Those arguments therefore are not properly before the Court. In any event, they lack merit.

1. The district court initially ruled that petitioner was a fugitive for purposes of the disentitlement doctrine in December 1990. Pet. App. 17a. That ruling constituted law of the case in the absence of "changed circumstances or unforeseen issues not previously litigated," *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) (quoting *Arizona* v. *California*, 460 U.S. 605, 619 (1983)), or until revised upon a showing that it "was 'clearly erroneous and would work a manifest injustice,'" *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona*, 460 U.S. at 618 n.8). Having ruled on the issue, the district court was entitled to consider the matter settled unless and until petitioner sought relief from that ruling and established "one of the * * * recognized exceptions to the law of the case doctrine." *Shore* v. *Warden*, 942 F.2d 1117, 1123 (7th Cir. 1991), cert. denied, 504 U.S. 922 (1992); accord *Merritt* v. *Mackey*, 932 F.2d 1317, 1322 (9th Cir. 1991); *Branning* v. *United States*, 784 F.2d 361, 363 (Fed. Cir. 1986); see also *Jeffries* v. *Wood*, 75 F.3d 491, 493 (9th Cir. 1996) (collecting authorities); *United States* v. *Sanchez*, 35 F.3d 673, 677 (2d Cir. 1994), cert. denied, 115 S. Ct. 1404 (1995).

Petitioner did not attempt to do so. Although he was arrested by the Swiss some seven months before the entry of judgment in the district court, see Pet. App. 30a, 32a-37a, and his counsel had attended proceedings conducted by a Swiss magistrate in Reno, see transcript of hearing held 9/13/93, attached to Pet. C.A. Mot. to Supplement Rec. (filed Dec. 9, 1994), petitioner never sought to have the district court reconsider its disentitlement ruling. Petitioner does not allege that the government or the court did anything that affirmatively prevented him from making that request. Indeed, his counsel raised claims concerning the impact of the Swiss arrest on discovery issues relating to *Karyn* Degen. See 2/1/93 Tr. 7-9, 39-44. And petitioner has never suggested, even to this day, that were he released from Swiss custody, he would give up his fugitive status and travel to this country to meet the criminal charges against him, or that he has made a good-faith effort to do so. On that record, the court of appeals correctly concluded (Pet. App. 6a-7a) that petitioner forfeited any claim he might have had to show that his fugitive status ceased upon his arrest in Switzerland.[25]

2. We have acknowledged that, before the lower courts, the government's briefs did not appropriately set

[25] Petitioner argues that this Court should entertain his claim that he is, in effect, a recaptured fugitive, because the government has informed this Court that petitioner "was taken into the custody of Swiss authorities who were acting at the behest of U.S. prosecutors." Pet. Br. 42-43 & n.24; see also U.S. Br. in Opp. 15 n.9 (acknowledging the authenticity of two Department of Justice letters now attached to petitioner's brief at App. 1a-4a). The fact remains, however, that petitioner never gave the district court any opportunity to assess the legal significance of his Swiss arrest. See Pet. App. 6a (noting that, even on appeal, petitioner "never proffered any * * * argument explaining the import" of the letters he cited). And because recapture does not invariably preclude disentitlement, see *Ortega-Rodriguez*, 113 S. Ct. at 1204, the significance of recapture would present in the first instance a question of policy for the court whose processes petitioner flouted. This Court would then review that determination only for "reasonableness." *Id.* at 1205-1206 & n.15. Petitioner's default in the lower courts is therefore fatal to his claim to former fugitive status.

forth the full factual background of the government's role in urging Swiss authorities to prosecute petitioner.[26] For two reasons, we disagree with petitioner's contention that our acknowledgement warrants vacatur of the judgment under the "unclean hands" doctrine. First, we do not believe that the government's misstatements below resulted in the judgments entered in the lower courts. Petitioner's own failure to raise the issue in the district court, which did not flow from any conduct by the government, was the direct cause of the court of appeals' refusal to consider it. Compare *Bank of Nova Scotia*, 487 U.S. at 254-256; *United States* v. *Payner*, 447 U.S. 727, 736 (1980).

Second, and more important, the "unclean hands" doctrine "does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly

[26] In our brief in opposition to the petition for a writ of certiorari (at 17 n.11), we noted that "[s]ome statements in the government's brief [in the court of appeals] incorrectly suggested that the Department of Justice played no part at all in instigating the Swiss prosecution, when in fact the Department did request that Swiss authorities prosecute petitioner in Switzerland for the same conduct that underlay his indictment in the United States." We indicated that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment." *Id.* at 16-17. We also stated, however, that the government's counsel at oral argument had apprised the court of appeals that the United States "encouraged" the Swiss prosecution and had sent Swiss authorities a copy of the U.S. indictment (*id.* at 17 n.11), and that that court had "properly resolved the Swiss prosecution issue against petitioner on the basis of his failure to develop an adequate record for examination of the issue." *Ibid.* In our view, the oral argument apprised the panel that the United States had asked the Swiss government to prosecute Degen, and that, in the government's view, the Swiss prosecution constituted an action within the discretion of a foreign sovereign, rather than (as petitioner alleged) a prosecution effectively conducted by the United States itself "under Swiss procedure" (Brief of the Appellants at 32).

guilty" of some transgression relating to "the transactions involved." *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). In particular, a court "should not automatically condone" a party's infractions merely because that party's opponent "is also blameworthy, thereby leaving two wrongs unremedied and increasing the injury to the public." *Republic Molding Corp.* v. *B.W. Photo Utilities*, 319 F.2d 347, 350 (9th Cir. 1963). That principle applies with great force here, because the disentitlement doctrine is primarily designed to further the public interest in the orderly administration of justice. See *In re Prevot*, 59 F.3d 556, 566 (6th Cir. 1995), cert. denied, No. 95-7343 (Mar. 4, 1996). Indeed, as we have argued, when applied to fugitives who have successfully avoided trial, it is a doctrine that safeguards the court's interest in ensuring that the discovery processes available in a related civil case are not improperly exploited, with the purpose and effect of thwarting the criminal prosecution.[27] Unprofessional conduct by a government attorney, which can effectively be addressed in other ways when it occurs, see *United States* v. *Hasting*, 461 U.S. 499, 506 n.5 (1983); *Bank of Nova Scotia*, 487 U.S. at 263, provides no persuasive basis for disregarding the strong public interests in the application of the disentitlement doctrine.

[27] The cases on which petitioner relies (Br. 44-45) principally involved courts' refusal to entertain patent infringement suits when the plaintiffs obtained the patents (or expanded their scope) through fraud. In none of those cases was a malefactor permitted to benefit from his inequitable actions merely to offset another litigant's wrongful conduct, and none refused to apply a doctrine developed for the court's benefit merely because it would benefit a litigant with purportedly unclean hands. Indeed, the courts' invocation of the "unclean hands" doctrine *served* the public interest by preventing a party who had obtained a patent through fraud from employing the monopoly power it conferred to the public's detriment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 409017 40092